

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANA H.,

Plaintiff,

CASE NO. C19-5748-MAT

V.

ANDREW M. SAUL,
Commissioner of Social Security,

Defendant.

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

Plaintiff proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is REMANDED for further administrative proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1972.¹ She has her GED, but no past relevant work. (AR 2026-28.) Plaintiff protectively filed both her SSI application and an application for Disability Insurance Benefits (DIB) on December 17, 2015, alleging disability beginning December 1, 2005. (AR 180-87.) The applications were denied at the initial level and on reconsideration.

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 After an initial postponement to allow plaintiff time to obtain a representative (*see* AR 33-
2 39), plaintiff appeared with counsel at a hearing on February 2, 2018. At hearing, ALJ Eric Basse
3 took testimony from plaintiff and a vocational expert (VE). (AR 2020-69.) Also, plaintiff
4 amended her alleged onset date to December 1, 2015, confirming, because of her “date last
5 insured,” the withdrawal of her DIB application. On August 1, 2018, the ALJ issued a decision
6 finding plaintiff not disabled. (AR 15-26.)

7 Plaintiff timely appealed. The Appeals Council denied plaintiff’s request for review on
8 June 8, 2019 (*see* AR 1), making the ALJ’s decision the final decision of the Commissioner.
9 Plaintiff appealed this final decision of the Commissioner to this Court.

10 **JURISDICTION**

11 The Court has jurisdiction to review the ALJ’s decision pursuant to 42 U.S.C. § 405(g).

12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
15 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
16 engaged in substantial gainful activity since the alleged onset date. At step two, it must be
17 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff’s
18 coronary artery disease, ischemic heart disease, asthma, and migraine headaches severe. Step three
19 asks whether a claimant’s impairments meet or equal a listed impairment. The ALJ found
20 plaintiff’s impairments did not meet or equal the criteria of a listed impairment.

21 If a claimant’s impairments do not meet or equal a listing, the Commissioner must assess
22 residual functional capacity (RFC) and determine at step four whether the claimant has
23 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform

1 sedentary work, except that she can occasionally climb ramps and stairs; never climb ladders,
2 ropes, or scaffolds; frequently balance, stoop, kneel, or crouch; and occasionally crawl; and cannot
3 have exposure to extremes of heat and cold or concentrated exposure to pulmonary irritants or
4 hazardous conditions. Plaintiff had no past relevant work to consider at step four.

5 If a claimant demonstrates an inability to perform past relevant work, or has no past
6 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant
7 retains the capacity to make an adjustment to work that exists in significant levels in the national
8 economy. With the assistance of the VE, the ALJ found plaintiff capable of performing other jobs,
9 such as work as a final assembler, addresser, and order clerk.

10 This Court's review of the ALJ's decision is limited to whether the decision is in
11 accordance with the law and the findings supported by substantial evidence in the record as a
12 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). *Accord Marsh v. Colvin*, 792 F.3d
13 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported
14 by substantial evidence in the administrative record or is based on legal error.") Substantial
15 evidence means more than a scintilla, but less than a preponderance; it means such relevant
16 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*
17 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of
18 which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
19 F.3d 947, 954 (9th Cir. 2002).

20 Plaintiff argues the ALJ erred at step two and in considering a medical opinion and her
21 symptom testimony. She requests remand for further administrative proceedings. The
22 Commissioner argues the ALJ's decision has the support of substantial evidence and should be
23 affirmed.

ORDER

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Step Two

2 At step two, a claimant must make a threshold showing her medically determinable
3 impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*,
4 482 U.S. 137, 145 (1987); 20 C.F.R. § 416.920(c). “An impairment or combination of impairments
5 can be found ‘not severe’ only if the evidence establishes a slight abnormality that has ‘no more
6 than a minimal effect on an individual’s ability to work.’” *Smolen v. Chater*, 80 F.3d 1273, 1290
7 (9th Cir. 1996) (quoting Social Security Ruling (SSR) 85-28). “[T]he step two inquiry is a de
8 minimis screening device to dispose of groundless claims.” *Id.* (citing *Bowen*, 482 U.S. at 153-
9 54). An ALJ is also required to consider the “combined effect” of an individual’s impairments in
10 considering severity. *Id.* A diagnosis alone is not sufficient. Instead, a claimant must show her
11 medically determinable impairments are severe. 20 C.F.R. § 416.921.

12 Plaintiff argues the ALJ erred at step two and beyond in failing to consider her obesity.
13 She notes evidence showing she has been overweight since at least 2012 and obese since
14 November 2015, the month prior to the amended alleged onset date. (AR 357 (September 2012:
15 164 pounds; body mass index (BMI) of 29.0); AR 713 (November 2015: 179 pounds; BMI 31.72);
16 SSR 02-01p (“Clinical Guidelines describe a BMI of 25-29.9 as ‘overweight’ and a BMI of 30.0
17 or above as ‘obesity.’”)² Her weight continued to increase, reaching 212 pounds (BMI 37.5) in
18 March 2017 and exceeding 200 pounds for the remainder of the time covered by the medical record
19 (see, e.g., AR 1258, 1272, 1276, 1544, 1646).

20 Pointing to SSR 02-01p, plaintiff observes the Commissioner's recognition of the role
21 obesity can play in relation to other conditions, including, *inter alia*, cardiovascular disease, heart

²³ ² The Social Security Administration (SSA) rescinded and replaced SSR 02-01p with SSR 19-2p, but the effective date of the new SSR, May 20, 2019, falls after the ALJ's August 1, 2018 decision.

1 disease, peripheral vascular disease, and dyslipidemia, and the way it is considered at steps two,
 2 three, and four. For instance, at step two, the ALJ will find obesity severe when it, alone or in
 3 combination with another impairment, significantly limits basic work activities, and “will also
 4 consider the effects of any symptoms (such as pain or fatigue) that could limit functioning.” SSR
 5 02-1p. At step four, the ALJ considers the effect obesity may have on an individual’s ability to
 6 function, including the ability to function over time. *Id.* “In cases involving obesity, fatigue may
 7 affect the individual’s physical and mental ability to sustain work activity.” *Id.*

8 Plaintiff asserts her obesity played a role in her coronary artery disease as seen by the
 9 repeated plaque buildups that led to multiple procedures over a three-year period. She also asserts
 10 its impact on her fatigue, which, as the ALJ acknowledged, plaintiff alleged was the biggest
 11 impediment to her ability to work. (See AR 20.) Plaintiff avers reversible error in the ALJ’s failure
 12 to consider her obesity. *See, e.g., Law v. Colvin*, No. 14-16496, 2016 U.S. App. LEXIS 13594 at
 13 *4 (9th Cir. July 16, 2016) (“Although obesity itself is not a listed impairment, the ALJ was
 14 required to consider Law’s obesity in combination with his other impairments throughout the five-
 15 step evaluative process. The ALJ failed to recognize the possibility that Law’s extreme obesity,
 16 in combination with his other impairments, might be sufficient to fully explain his reported
 17 symptoms.”) (citing SSR 02-1p).

18 The Commissioner contends plaintiff “misunderstands the purpose of step two” as “merely
 19 a threshold determination meant to screen out weak claims[,]” and not to “identify the impairments
 20 that should be taken into account” when determining the RFC. *Buck v. Berryhill*, 869 F.3d 1040,
 21 1048-49 (9th Cir. 2017) (citing *Bowen*, 482 U.S. at 146-47). The Commissioner maintains plaintiff
 22 “could not possibly have been prejudiced[]” where step two was decided in her favor because any
 23 alleged error is “harmless and cannot be the basis for a remand.” *Id.* at 1049. The Commissioner

1 further contends plaintiff alleges no more than generalized harm, without explaining how her
 2 obesity specifically and independently caused additional limitations. The Commissioner states the
 3 ALJ was free to consider plaintiff's limitations through the lens of her severe coronary artery
 4 disease, rather than her obesity, and that the ALJ, in any event, specifically considered plaintiff's
 5 fatigue and other symptoms in assessing her RFC. The Commissioner notes that a failure to
 6 identify an impairment at step two is harmless when the ALJ considered any limitations that would
 7 have been posed by the impairment. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007).

8 The Court finds reversible error. Plaintiff's obesity, either as a description, diagnosis,
 9 problem, or issue relevant to her symptoms and/or care, is repeatedly mentioned throughout the
 10 record. (See, e.g., AR 876, 924, 943, 1040, 1126, 1255, 1263, 1272, 1276, 1350, 1417, 1460, 1480,
 11 1499, 1517, 1562, 1646, 1793, 1869.) Plaintiff also discussed her weight gain at hearing. (AR
 12 2038 ("And I gained 70 pounds [after the bypass in 2017], in which they were very unhappy
 13 with.")) Yet, the ALJ did not mention plaintiff's obesity in the decision.

14 As a general principle, an ALJ's error may be deemed harmless where it is
 15 "inconsequential to the ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d 1104,
 16 1115 (9th Cir. 2012) (cited sources omitted). The Court looks to "the record as a whole to
 17 determine whether the error alters the outcome of the case." *Id.* Therefore, "[e]ven if an ALJ does
 18 err in failing to find an impairment severe at step two, such error is properly deemed harmless
 19 where the limitations associated with the impairment are considered at step four." *Lewis*, 498 F.3d
 20 at 911.

21 However, this is not a case in which it can be said "all impairments" whether severe or not
 22 "were taken into account" in assessing RFC. *Buck*, 869 F.3d at 1048-49 (finding no error where,
 23 after a remand, an ALJ identified three new severe impairments at step two, but did not find the

1 RFC altered: “In fact, ‘[i]n assessing RFC, the adjudicator must consider limitations and
2 restrictions imposed by all of an individual’s impairments, even those that are not ‘severe.’ The
3 RFC therefore *should* be exactly the same regardless of whether certain impairments are
4 considered ‘severe’ or not. Here, all impairments were taken into account both times.”) (internal
5 citation omitted; emphasis in original). There is, in fact, no indication the ALJ was even aware of
6 plaintiff’s obesity, whether deemed a severe impairment or not and whether considered alone or
7 in combination with other impairments. Nor can it be assumed, given plaintiff’s severe cardiac-
8 related impairments and asthma and her primary symptom of fatigue, that obesity would have no
9 bearing on her functioning. *See* SSR 02-1p. Under these circumstances, the Court is unable to
10 find the omission of obesity harmless. This matter must be remanded for further consideration of
11 plaintiff’s impairments beginning at step two, including consideration of her obesity.

12 Medical Opinion

13 Margaret Sandler, Ph.D., ARNP, wrote a letter dated February 1, 2018. (AR 1346.)
14 Sandler indicated she had served as plaintiff’s primary care provider since December 2014 and
15 was familiar with her medical history. She opined plaintiff was not “able to work at any
16 competitive job on a full-time basis due to her combination of medical conditions[,]” and that,
17 “[i]n particular, her cardiovascular health and associated fatigue would prevent her from sustaining
18 work.” (*Id.*) Sandler also stated that, while “hopeful” plaintiff’s medical condition “may stabilize
19 to the point that she is able to return to work part-time in the future,” Sandler did not believe
20 plaintiff was “employable in any capacity” at that time and since early 2015. (*Id.*)

21 The ALJ gave Sandler’s opinion little weight. (AR 24.) The ALJ found Sandler did not
22 provide sufficient medical explanation, provided only a conclusive finding on disability, an issue
23 reserved to the Commissioner, *see* 20 C.F.R. 416.927(e), SSR 96-5p, and that the letter lacked a

1 true functional assessment. As the Commissioner observes, the ALJ need only have provided
 2 germane reasons for rejecting Sander's "other source" opinion. 20 C.F.R. § 416.902(a); *Molina*,
 3 674 F.3d at 1112.³ While the ALJ could be said to have provided germane reasons in relation to
 4 Sandler, this matter is subject to remand for the reasons stated above. On remand, the ALJ should
 5 reconsider all medical opinion and other medical evidence at step two and beyond.

6 Symptom Testimony

7 The rejection of a claimant's subjective symptom testimony⁴ requires the provision of
 8 specific, clear, and convincing reasons. *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014)
 9 (citing *Molina*, 674 F.3d at 1112). "General findings are insufficient; rather, the ALJ must identify
 10 what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*
 11 *v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996).

12 The ALJ here found plaintiff's statements concerning the intensity, persistence, and
 13 limiting effect of her symptoms not entirely consistent with the medical and other evidence in the
 14 record. It can be said that, in so doing, the ALJ identified specific, clear, and convincing reasons
 15 in support of his conclusion, such as evidence of effective treatment and improvement, symptoms
 16 controlled with medication, failure to comply with treatment, and stability during absent treatment.
 17 (AR 20-23). See, e.g., *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017); *Molina*, 674
 18 F.3d at 1113-14; *Tommasetti v. Astrue*, 533 F.3d 1035, 1039-40 (9th Cir. 2008); *Warre v. Comm'r*
 19 *of the SSA*, 439 F.3d 1001, 1006 (9th Cir. 2006); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.

20 ³ New regulations include advanced practice registered nurses like Sandler, as well as audiologists,
 21 and physician assistants, as "acceptable medical sources," other licensed health care workers as "medical
 22 sources," and other sources of evidence as "nonmedical sources." 20 C.F.R. § 416.902(a), (d), (e). The
 new regulations are, however, applicable only to claims filed after March 27, 2017.

23 ⁴ Effective March 28, 2016, the SSA eliminated the term "credibility" from its policy and clarified
 the evaluation of a claimant's subjective symptoms is not an examination of character. SSR 16-3p. The
 Court continues to cite to relevant case law utilizing the term credibility.

1 2005); *Morgan v. Comm'r of SSA*, 169 F.3d 595, 599-600 (9th Cir. 1999); 20 C.F.R. § 416.929
2 (c)(3); SSR 16-3p. However, the ALJ's failure to consider plaintiff's obesity necessitates a re-
3 evaluation of the medical record, including the evidence as it relates to plaintiff's symptom
4 testimony. The ALJ must therefore reconsider plaintiff's symptom testimony on remand.

5 **CONCLUSION**

6 For the reasons set forth above, this matter is REMANDED for further administrative
7 proceedings.

8 DATED this 11th day of May, 2020.

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10 Mary Alice Theiler
11 United States Magistrate Judge

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